Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Advanced Television Systems	)	
and Their Impact Upon the	)	MM Docket No. 87-268
Existing Television Broadcast	)	
Service	)	

COMMENTS OF MEDIA ACCESS PROJECT, *et al.*

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SUMMARY

As the Commission enters the final phases of its digital television proceeding, it is time to shift the focus to the needs and rights of the viewing public. Until now, the principal, and often exclusive, emphasis has been on technological issues and broadcasters' needs to have "flexible" use of an extra 6 MHz of spectrum. The Communications Act requires the Commission to place principal priority on meeting the needs of the American public to have access to diverse sources of information. To fulfill this mandate, the Commission must now turn to the details of implementation. This means that universal access to free over-the-air television must be assured, and the Commission must provide for non-commercial uses of the spectrum.

Pending legislative proposals and broadcasters' rhetoric indicate that broadcasters want to provide just one "Standard Definition" television service on the advanced television spectrum, while using the remainder of the spectrum for pay and non-broadcast services. This gives the public no more than what it currently has, while giving a windfall to broadcasters. MAP, *et al.* therefore urge the Commission to allocate only enough capacity for broadcasters to provide one digital channel. This system resembles what is currently under consideration in the United Kingdom. The Commission could achieve this goal in several different ways:

- allocate less than 6 MHz of spectrum to incumbent broadcasters
- allocate the spectrum (by hearing or auction if authorized) to other parties, but ensure broadcasters' conversion to digital through "must carry" rights
- allocate the spectrum to broadcasters, but require them to lease out their excess capacity to nonaffiliated programmers

As a threshold matter, the Commission may not, as a matter of law, limit eligibility for the ATV spectrum to incumbent broadcasters. What the Commission proposes here is not a mere

"reallocation" of spectrum. This will not be an immediate exchange of spectrum - broadcasters will have use of two allocations of spectrum for 10, 15 or more years. The Commission is creating a new service - broadcasters will be able, for the first time, to provide multiple program feeds and ancillary services. Therefore, under *Ashbacker v. FCC*, 326 U.S. 327 (1945) and its progeny, the Commission must allow new entrants to apply for the spectrum. Permitting new entrants also promotes the most critical goal of the Communications Act and the First Amendment - viewpoint diversity.

Should the Commission nonetheless decide to award the full 6 MHz to incumbent broadcasters, however, MAP, *et al.* urge the Commission to require that the spectrum be "principally used" for the provision of free, over-the-air broadcasting. There is, however, no good policy reason to mandate high definition television service. "Principal use" should require that 75% of a broadcaster's digital capacity be use for free broadcast service. If the Commission fails to adopt this requirement, it can, and should, auction the spectrum pursuant to Section 309(j).

It is a central tenet of broadcast spectrum allocation policy that broadcasters are required to provide public service in exchange for grant of spectrum. Under the Commission's proposal, broadcasters will have the use of an extra allocation of spectrum for 10-15 years, if not longer. The extra allocation will permit them to provide multiple program services. Thus, core public interest duties (such as reasonable access, equal opportunities, community interest programming, children's educational and informational programming and equal employment opportunity) apply to both free and subscription program services, the Commission has the authority and the duty to require additional "enhanced" public interest obligations. These enhanced obligations should include:

- Free time/reservation of capacity for use by political candidates
- Reservation of capacity for noncommercial public use
- Reservation of capacity for children's educational and informational programming, at a minimum, equal to 20% of a broadcaster's total program time.

These public interest obligations will mean little, of course, unless the Commission ensures that all segments of the American public continue to have access to free, over-the-air television. Thus, the Commission should require that broadcasters simulcast their NTSC channel on a program service of the ATV channel. And, to ensure universal access ***and*** the return of valuable NTSC spectrum, the Commission should set a date certain for return of the spectrum (between 5 and 15 years) and create a fund, underwritten by broadcasters, to provide digital receivers or converters to those who cannot afford them.

Finally, to the extent that the Commission adopts "must carry" requirements for digital television, it should make clear that only those program services that comply with the core and enhanced public interest obligations are entitled to that benefit. The policy justification for must carry was the special role of broadcasting as a free, universal service that serves the public with local and electoral related programming was the justification for "must carry." To grant any other program service this advantage would run contrary to expressed intent of Congress, as recognized by the Supreme Court in *Turner Broadcasting v. FCC*, 114 S.Ct. 2445 (1994).

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Media Access Project, the Center for Media Education, Consumer Federation of America, the Minority Media and Telecommunications Council and the National Federation of Community Broadcasters ("MAP, *et al.*") respectfully submit these comments in response to the *Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry*, FCC 95-315 (Released August 9, 1995) ("*FNOPR*") in the above referenced matter. In the *FNOPR*, the Commission asks questions about whether, and under what terms, each current television licensee should receive exclusive use of a 6 megahertz ("MHz") band of spectrum for the purpose of simulcasting in analog and digital modes, and then converting from their current analog to digital transmission.

In light of broadcasters' proposals to provide just one free "Standard Definition" program service, along with multiple pay and non-broadcast services over the 6 Mhz of spectrum, MAP, *et al.* urge the Commission to allocate only enough capacity for broadcasters to provide one digital channel. In the event the Commission nonetheless decides to award the full 6 MHz to incumbent broadcasters, these comments address the amount of non-broadcast services broadcasters should be permitted to provide, the public interest requirements to which they should be subject, the mechanisms the Commission should adopt to ensure continuous, universal access to free over-the-air television and how must-carry benefits should apply to digital services.

INTRODUCTION

This may well be the most important proceeding in forty years with regard to free over-the-air broadcast television. Existing television licensees have asked the Commission for a huge gift - enormous amounts of additional, valuable, publicly-owned spectrum. Access to this spectrum will permit broadcasters to provide not one, but multiple, broadcast and non-broadcast services. But broadcasters have offered nothing additional to compensate the public for the vastly valuable additional privileges. Instead, they merely propose to do nothing more than they presently provide in fulfillment of their public interest obligations.

MAP, *et al.* would have preferred that Congress resolve this debate by auctioning spectrum which has been withheld from use pending development of ATV technology and then reserving a substantial percentage of the proceeds for "public service media" uses like school and library access to advanced telecommunications networks, public broadcasting, production of children's informational and educational programming and minority media development programs. But Congress has as yet taken no such action, and there is no assurance that it will indeed soon resolve this matter. It now falls to the Commission to address these very difficult and costly questions.

Given this responsibility, it is time for the Commission to shift the focus of this debate. As the questions turn from engineering and technical issues to matters of licensing and program service, the needs of the public become central. Until now, the principal, and often exclusive, emphasis has been on broadcasters' needs. And, to be sure, broadcasters have persuasively addressed their need to compete in a multichannel world of cable and direct broadcast satellite, to have the "flexibility" to engage in ancillary and supplementary services, and to have an adequate

period to transition to digital before having to return the extra spectrum. The Commission, as it is mandated by law, must now bring the spotlight on the needs and rights of the public - to have access to diverse sources of information, to be adequately compensated with financial remuneration and enhanced public service, and to be assured universal access to free over-the-air television.

The Commission has broad powers under Title III of the Communications Act. Historically, it has used this authority to promote and shape the evolution of new technologies, with the twin goals of creating competitive markets which need less regulatory involvement, and ensuring that the needs of those who lack market power, such as children, are not overlooked. While these powers have not always been exercised with perfect wisdom, *e.g.*, regulations which stifled the early growth of cable TV, the evidence is that wise regulatory policy can stimulate development of effective competition and at the same time protect underserved Americans.

With respect to over-the-air TV, the Commission long followed this model. Of particular relevance here is the fact that capacity for non-commercial uses was reserved at an early point in the development of the medium. As to programming, the Commission initially required broadcasters to provide material deemed necessary, but not necessarily profitable. Over time, it developed explicit requirements for public service programming in the form of the fairness doctrine. Later, it established guidelines for the quantity of news, public affairs and locally-originated programming. As marketplace forces changed and these needs were better met, the Commission was able to revise and/or repeal these regulations. But at no time has the Commission disclaimed the authority to require programming which serves the public interest or the power to require what the market does not provide.

In approaching the evolution of digitally transmitted TV, the Commission faces similar challenges, albeit in a different technological and marketplace environment. Even so, many of the needs are unchanged, and must be addressed. There is first a need to preserve what has been accomplished, and to ensure that needs which may not be adequately met in the early stages of a new technological era will not be sacrificed to the altar of economic efficiency. Thus, provision must be made for civic discourse, public education, cultural and other non-commercial needs which have historically come from the non-profit sector.[1] So, too, is it likely to be the case that segments of the public which may be demographically unattractive and thus not well-served by advertiser-supported services will be even less well-served by new subscription services.

Over-the-air broadcasters have purported to have met many of these needs in recent years, and have justified their receipt of free access to spectrum by their commitment to provide service in the public interest. Indeed, broadcasting has contributed to the maintenance of a national identity by giving us shared experience of certain kinds of programming and access to vast amounts of information. In an increasingly fragmented and privatized economy, ensuring that such service is available may prove ever more important to preserving a literate and well-informed populace.

In the past, the Commission has established guidelines or other means to insure that broadcasters meed or exceed such service minima as the Commission may determine necessary to serve the public interest. There is sound logic to follow that precedent here. The first step

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[1]It bears emphasis here that "non-profit sector" is not here a reference to government. What distinguishes the American system from other Western democracies is our extensive reliance on private voluntary institutions for much of our cultural, educational, medical and social service needs.

is to identify those needs and specify appropriate benchmarks. If marketplace forces should prove to provide adequate stimulus to meet those needs, imposition of specific requirements may turn out to be an unnecessary burden, and they can be repealed. But establishing such guidelines in the first instance is wholly reasonable, given the value of the additional new privileges.

I. BROADCASTERS SHOULD RECEIVE NO MORE CAPACITY THAN IS NEEDED TO PROVIDE ONE DIGITAL PROGRAM SERVICE.

In its *FNOPR*, The Commission reiterates its prior conclusion that broadcasters should receive a 6 MHz allocation of spectrum for the transition to digital television. *FNOPR* at ¶21. The decision to allocate that particular bandwidth size is largely based upon the standards adopted for the so-called "Grand Alliance" ATV transmission system. *Id.* The Commission also notes the "great capability and flexibility that can operate within this confine." *Id.* It thus concludes that providing 6 MHz "represents the optimum balance of broadcast needs and spectrum efficiency." *Id.*

A. The Public Does Not Benefit From the Broadcasters' Plan to Provide One Free SDTV Service.

The Commission has not balanced the rights and needs of the public in this equation. Without casting aspersions on the good faith of the Commission's advisory committee on advanced television issues, it is a matter of fact that the membership of this committee was not structured to reflect the needs of the public, as opposed to affected industries. Indeed, a number of consumer, citizen and minority representatives suggested for membership on the advisory committee were effectively "blackballed" by powerful industry interests. To the extent that the Grand Alliance was formed by a group which inadequately represented the interests of the general public, its deliberations were incomplete

It is by no means certain that the 6 MHz bandwidth choice will stand the tests of time and technology. Broadcasters actively considering digital transmission options have vastly differing perspectives on what kind of signal compression is feasible and likely: some are gearing up to provide multiple program feeds of traditional "free" Standard Definition Television ("SDTV") programming,[2] others are planning one "free" SDTV or High Definition Television ("HDTV") channel, with the remainder to be used for non-broadcast and subscription broadcast services. Indeed, "spectrum flexibility" language in the currently pending telecommunications legislation (which has of this date passed both the House and Senate) anticipates that broadcasters will provide just one "free" service, and use the rest for so-called "ancillary and supplementary services" for which subscriber fees may be charged.[3]

It is clear that broadcasters benefit from being able to carry more and different services than they carry today. However, if broadcasters simply provide one "free" over-the-air feed, it is fair to ask how the ***public*** is better off. It is not even certain that an SDTV service would provide significantly improved reception. Nor is it yet known if SDTV will require reduction in the service area - and the number of viewers reached - by a licensee. The public is entitled to share the dividends of service provided by means of publicly-held spectrum. And there is no reason why it is inherently necessary for incumbent broadcast licensees to be the ones to have

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[2]According to the Commission, SDTV is a "digital television system in which picture quality is approximately equivalent to the current NTSC television system. *FNOPR* at ¶4 n.4.

[3]For example, the Senate Bill, S. 652, states that if the Commission permits licensees to provide advanced television services, then "it shall adopt regulations that allow such licensees to make use of the advanced television spectrum for the transmission of ancillary and supplementary services if the licensees provide without charge to the public at least one advanced television program service as prescribed by the Commission." S. 652, 104th Cong., 1st Sess. §206 (1995). The House Bill, H.R. 1555, has similar language. H.R. 1555, 104th Cong., 1st Sess. §301 (1995).

access to this valuable resource. This is especially true if the spectrum is to be used for subscription services.[4] If there is to be no dividend from vastly improved "free" program services, a strong case can be made that the privilege should be auctioned, and not merely given away.

B. The Commission Can, Consistent with the "Grand Alliance" Transmission System, Give Broadcasters No More Capacity Than is Necessary to Provide One Free Over-The-Air Program Service.

In light of numerous broadcasters' proposals to do no more than carry one "free" digital signal, the Commission should initially permit broadcasters to use only so much capacity as proves necessary to provide such "free" digital service. The Commission could accomplish this goal in several different ways. First, it could allocate only enough spectrum to provide one digital channel, *i.e.*, between 2-3 MHz.[5]

Second, the Commission could adopt a variation of what MAP, *et al.* call the "condominium" option. Under one such variation, the Commission would grant the 6 MHz spectrum (either by hearing or auction, if authorized) to applicants, including new entrants. *See* discussion at Section II, *below*. If an incumbent broadcaster obtains the spectrum set aside for its channel, then its conversion to digital is not in jeopardy. However, if another applicant obtains spectrum intended for the incumbent broadcaster's channel, the Commission could require the winning applicant, either for free or for payment, to carry the broadcaster's channel on its spectrum.

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[4]Since subscription services are entirely driven by marketplace demand, and since there are at present no "trusteeship" obligations to provide "equal time," children's programming and other matter, there is no reason why one programmer is better suited than any other to be the vendor.

[5]MAP, *et al.* recognize that at this time it is a matter of some speculation as to how much capacity may be needed for this purpose, and that this amount will vary from moment to moment, since certain kinds of programming, *e.g.*, sporting events, live music, will need more capacity than others. However, it is known that broadcasters will not need the entire 6 MHz bandwidth for Title III regulated activities at least much of the time, and perhaps at all times.

The winning applicant, would be subject to public interest obligations and fees for ancillary and supplementary services. This variation on "must carry" ensures broadcasters conversion to digital transmission, which they claim is essential to their survival, but forces them to bid against others for the right to use the spectrum for subscription and non-broadcast services.[6]

A second variation on the "condominium" option assumes that incumbent broadcasters are gifted with the exclusive right to obtain the entire 6 MHz spectrum set-aside which has been established for ATV. Broadcasters would be permitted to provide one or two free over-the-air services, subject to public interest obligations, but would be required to lease the remainder to nonaffiliated programmers at a rate determined by the Commission that will promote, and not deter, access.[7]

Should these nonaffiliated programmers also be licensees, use of another's spectrum should count against their ownership limits. This limitation tracks similar rules the Commission has adopted for broadcasters' Local Marketing Agreements ("LMAs"). A broadcaster with control over another station pursuant to an LMA is attributed with ownership of that station for purposes

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[6]This option should take into account the importance of low power TV by providing that low power operators' signals would also qualify for carriage.

[7]The rates the Commission has set for cable commercial leased access are instructive in this regard. *See Rate Regulation Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631, 5945-54 (1993). Because the Commission has placed an extremely high burden on programmers to demonstrate that leased access rates are unreasonable, and because it has failed to adopt a non-profit rate, very few programmers are able to afford leased access. *See Denver Area Educational Telecommunications Consortium, Inc.*, DA 95-2261 (CSB Oct. 31, 1995) (Non-profit leased access programmer seeking emergency relief from huge rate leased access rate increase imposed by Telecommunications, Inc.) There is consensus that, for the most part, commercial leased access has been an abject failure. *See* Donna N. Lampert, Cable Television: Does Leased Access Mean Least Access? 44 Fed. Comm. L. Journal 245 (1992); Comments of Videomaker Magazine, Inc. in *Rate Regulation for Cable Television*, MM Docket No. 92-266, filed February 3, 1994.

of the Commission's local and national ownership limits *See Revision of Radio Rules and Policies*, 7 FCC Rcd 6387, 6400-02 (1992).[8]

These proposals for ATV licensing closely resemble the model endorsed by the British government. Secretary of State for National Heritage (U.K.) White Paper, *Digital Terrestrial Broadcasting*, Cm. No. 2946 (Aug. 16, 1995)(The "*White Paper*" is provided as Attachment A hereto). The British government argues that allocating an entire block of more than 6 MHz of spectrum to only one broadcaster would limit opportunities for new broadcasters and for competition, and would constrain the variety of programming available to the viewer. *Id.* at 8. Under the British government's plan, broadcasters would get only enough capacity to broadcast one program service and would pay negotiated carriage fees to "multiplex providers" for that privilege. *Id.* Broadcasters would be able to secure distribution of multiple program services, but presumably would pay proportionally greater amounts for the right to broadcast multiple signals and would be subject to audience reach caps. *Id.* at 21. While the plan provides for provision of ancillary services by both broadcasters and multiplex providers, these services may take up no more than ten percent of a channel's capacity. *Id.* at 14. Moreover, the plan (which also addresses digital radio) expressly provides that capacity be reserved for non-commercial uses by insuring that the British analog (the BBC) be provided with adequate spectrum to be used subject to the BBC's charter.

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[8]It is for this reason that the Commission's reliance on *United States v. Storer*, 351 U.S. 192 (1956), is misplaced. *FNOPR* at ¶ 29. The case involved an original application, the grant of which would have violated the Commission's multiple ownership rules. MAP, *et al.* do not here argue that all applicants for ATV spectrum be given comparative hearings, no matter how deficient the application. They simply argue that otherwise qualified applicants must be given an opportunity, in a comparative hearing, to demonstrate that they can better serve the public than incumbent broadcasters.

Another advantage of the condominium-type allocation scheme is that it is compatible with implementing the "Grand Alliance" transmission system. To the extent that HDTV would not be possible on this amount of spectrum, for the reasons discussed in Section IV.A., *below*, MAP, *et al.* believe that the public's interest in being adequately compensated (in service, or in money) outweighs its interest in receiving HDTV. In any event, the rapid pace at which digital compression technology is developing could well permit HDTV to be transmitted on less capacity than 6 MHz in the not too distant future.

II. ELIGIBILITY

The Commission requests comment on its prior conclusion that initial eligibility for the spectrum should be limited to existing over-the-air broadcasters. That conclusion is warranted, it claims, because of "the shortage of suitable spectrum and our decision not to allocate additional spectrum for this purpose." *FNOPR* at ¶27. The Commission asserts that, because it will require broadcasters to return one of their two blocks of spectrum, it is neither "creating a new service" nor giving "more spectrum for broadcasters and less spectrum for others." *Id.* at ¶28. Instead, it claims that it is simply engaging in "reallocation" of the spectrum. *Id.* at n.30.

But the Commission's semantic legerdemain does not make this proceeding a mere real-location. As a matter of law and policy, the Commission should permit new entrants to apply for the ATV spectrum.

A. The Commission is Prohibited, As a Matter of Law, From Limiting Eligibility to Incumbent Broadcasters.

The Commission seeks comment on its tentative conclusion that *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) does not preclude the Commission from limiting eligibility for the ATV spectrum to incumbent broadcasters. In *Ashbacker*, the Supreme Court found that Section

309(a) of the Communications Act required the FCC to conduct a comparative hearing when mutually exclusive applications are filed for a station license

To avoid the mandate of *Ashbacker*, however, the Commission asserts that in granting ATV spectrum, it is merely "reallocating" spectrum, and that it is not

> creating a new service, and our eligibility restriction does not ultimately result in more spectrum for broadcasters or less spectrum for others. We are merely moving each existing broadcaster from one channel to a different channel in a one-for-one exchange designed to accomplish a number of long-term public interest goals

FNOPR at ¶28.

To call the proposed grant of the ATV spectrum a mere "reallocation" grievously mischaracterizes the transaction the Commission proposes here. In previous reallocation orders, the Commission has mandated an ***immediate*** exchange of one spectrum block for another. *See, e.g., Logansport Broadcasting Corp. v. United States*, 210 F.2d 24 (D.C. Cir. 1954); *Peoples Broadcasting Co. v. United States*, 209 F.2d 286 (D.C. Cir. 1953). But by no means is the grant of this spectrum a simple one-for-one exchange. At the very least, broadcasters will have the use of twice as much valuable spectrum at two separate locations for a minimum of ten to fifteen years. And, although the Commission contemplates that broadcasters will ***eventually*** return "one of the channels at the end of the transition period," *FNOPR* at ¶17, it does not firmly commit to such a plan. Without an explicit condition requiring broadcasters to return one of their spectrum blocks immediately, existing broadcasters are gaining a supplemental - rather than a substitute - authorization to operate additional media outlets.

Moreover, and in any event, the Commission is here creating a new, separate service - digital television - which will permit broadcasters to provide multiple program, non-program and subscription services. Because the Commission is not merely reallocating spectrum, and because

it is creating a new service, the spectrum set aside for advanced television use must be awarded competitively. While the Commission has the authority to establish initial eligibility parameters, *see, e.g.*, *United States v. Storer*, 351 U.S. 192 (1956); *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1991); *Hispanic Information and Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289 (D.C. Cir. 1989), it cannot make the threshold so high that only the incumbent could ever be eligible. *See Citizens Communications Center v. FCC*, 447 F.2d 1201, 1212 n.34 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972).[9]

As the Supreme Court made clear in *Ashbacker*, the Communications Act requires the Commission to ensure that there is equal opportunity to obtain use of spectrum newly made available for new services. While the Commission eventually plans to open up the advanced television marketplace, *FNOPR* at ¶26, new entrants will be significantly disadvantaged by the time the FCC welcomes competitors to apply for ATV spectrum. Without a date certain for the incumbent broadcasters' return of spectrum, a spectrum shortage may make it technologically impossible for competitors to enter the ATV market. Thus, incumbent broadcasters are enriched doubly: (1) they are permitted to keep both analog and digital blocks of spectrum and (2) potential competitors are indefinitely kept at bay.

The limitations of the Commission's authority to limit eligibility here were set forth in closely analogous circumstances in *Community Broadcasting Co., Inc. v. FCC*, 274 F.2d 753

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[9]It is for this reason that the Commission's reliance on *United States v. Storer*, 351 U.S. 192 (1956), is misplaced. *FNOPR* at ¶29. The case involved an original application, the grant of which would have violated the Commission's multiple ownership rules. MAP, *et al.* do not argue here that all applicants for ATV spectrum be given comparative hearings, no matter how deficient the application. They simply argue that otherwise qualified applicants must be given an opportunity, in a comparative hearing, to demonstrate that they can better serve the public than incumbent broadcasters.

(D.C. Cir. 1960). There, the Court reversed the Commission's grant of an additional authorization for an incumbent broadcaster to operate simultaneously on both VHF and UHF frequencies. In awarding the grant without hearing, the Commission accepted the incumbent broadcaster's argument that, given then-current economic conditions, its UHF station would be forced to cease operations and that the public interest would be better served if an immediate, though temporary, VHF license were issued. Absent such an immediate grant, it argued, the community would lack "competitive" television service. *Id.* at 757. The Court rejected this justification, holding that

> The factual and legal issues involved ..are not whether a new channel is ultimately necessary, but whether the service in question is so immediately and imperatively necessary that it must be granted at once in spite of the great financial risk of one party and the possible prejudicial effect on the other who is not favored, and the derogation of the whole comparative hearing concept. ..This is not a matter of form; it is substantive. The findings must also show how and why the public interest requires the added interim TV service while it hears and considers the competing applications over the 2 1/2 year period...

Id. at 762.

There is nothing in the record of this proceeding to establish why advanced television service "is so immediately and imperatively necessary that it must be granted at once" without opening up the proceeding to potential competitors.[10] Thus, as a matter of law, the Commission must permit new entrants to apply for the ATV spectrum.

B. As a Matter of Policy, the Commission Should Permit New Entrants to Apply for the ATV Spectrum.

Permitting new entrants to apply for the ATV spectrum promotes perhaps the most critical

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[10]Congress apparently does not believe that immediate implementation of ATV is necessary. The pending Budget Reconciliation bill directs the FCC to study whether broadcasters should bid for spectrum, and prohibits the Commission from awarding ATV licenses earlier than November, 1996. Christopher McConnell and Christopher Stern, "Hill leaves FCC door ajar to DTV auctions," *Broadcasting and Cable*, November 13, 1995 at 4.

goal of the Communications Act and the First Amendment - viewpoint diversity. As the Supreme Court has stated

> Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission. We have observed that "'the "public interest" standard necessarily invites reference to First Amendment principles,'"...and that the Communications Act of 1934 has designated broadcasters as "fiduciaries for the public."

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 567 (1990) [citations omitted].

It is well established that both the Courts and the Commission have long thought that viewpoint diversity is best achieved through diversifying station ownership. *E.g., FCC v. National Citizens Comm. for Broadcasting* 436 U.S. 775, 780 (1978) ("In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power."); *Television Satellite Stations Review of Policy and Rules*, 10 FCC Rcd 3524, 3550 (1995) (citing *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership Standard, FM and Television Broadcast Stations*, 22 FCC 2d 306, 311 (1970), *recon. granted in part* 28 FCC 2d 662 (1971); *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, 4 FCC Rcd 1471, 1476-77 (1988)). But the Commission's proposal to preclude new entrants from competing with incumbent broadcasters for ATV spectrum is completely antithetical to increasing diversity of ownership and, thereby, diversity of voices.

Limiting eligibility to incumbent broadcasters also undermines competition - a core goal of the Communications Act, and of this Commission. Indeed, "[t]he basic teaching of the *Ashbacker* case is that comparative consideration by the Commission and competition between appli-

cants is the process most likely to serve the public." *Community Broadcasting Co. v. FCC*, 274 F.2d 753, 759.

Moreover, permitting new entrants to apply for ATV spectrum provides a race-neutral and gender-neutral means of promoting minority and female ownership. *Cf. Adarand v. Pena*, 63 USLW 4523, 4529-31 (1995). The Commission and other governmental bodies have long recognized that minorities and women are substantially underrepresented as owners of television broadcast stations. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. at 570 (*citing Radio Jonesboro, Inc.*, 100 FCC2d 941, 945 n.9 (1985)).[11] Because courts now subject race-based affirmative action programs to strict scrutiny,[12] and because other programs designed to increase minority ownership have been abolished or have very limited impact,[13] the Commission now must find

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[11]Minorities own just 2.9% of all U.S. television stations, and they are among the smallest in the industry. The Minority Telecommunications Development Program, National Telecommunications and Information Administration, *Analysis and Compilation of Minority-Owned Commercial Broadcast Stations in the United States* (Sept. 1994). Women own just 1.9%. U.S. Department of Commerce, Bureau of the Census, *Women Owned Business* (1990) (based on interview with Bureau representative citing breakdown of the 1987 economic census).

[12]The Supreme Court has held that *all* government actions based on racial classifications are subject to strict scrutiny. *Adarand*, 63 USLW at 4529-31.

[13]The tax certificate program was abolished in April 1995. *The Self-Employed Persons Health Care Extension Act of 1995*, Pub. L. No. 104-7 (Apr. 11, 1995). Because revocations are so rare, and denial of renewal is so uncommon, the Commission's distress sale policy is not a significant source of new minority licensees. *See* Testimony of Raul Alarcon, Jr., President and CEO of Spanish Broadcasting System, Inc., before the Senate's Committee on Finance (Mar. 7, 1995) ("[b]etween 1978-1994, only 42 distress sales were approved -- on average less than four a year. Indeed there is no guarantee in any given year that there will be any stations available for distress sales at all."). *See also* Kurt Wimmer, *The Future of Minority Advocacy Before the FCC: Using Marketplace Rhetoric to urge Policy Change*, 41 Fed. Com. L.J. 133, 145-46 (Apr. 1989) (between 1978-1988, 38 distress sales occurred). Comparative hearing minority preference policies have failed to increase significantly ownership opportunities for minorities. *See* Testimony of Amador S. Bustos to the Ways and Means Committee, House of Representatives, Concerning the FCC's Minority Tax Certificate Program (Jan. 17, 1995) ("Despite all the minority preferences provided by the FCC in the comparative hearing it is extremely difficult

a race-neutral and gender-neutral method of rectifying this underrepresentation. Allowing new entrants to apply for ATV spectrum would provide minorities and women with an opportunity they would not have otherwise to increase their ownership of television stations.

III. AUCTIONS

The Commission questions whether spectrum previously reserved for future ATV service should, or even could, be subject to an auction under Section 309(j) of the Communications Act. In recognition of the expressed desire of a number of broadcasters to provide subscription services, it notes that Section 309(j) permits auctions where "the principal use of such spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers...." *FNOPR* at ¶31. However, the Commission states its "belief" that "the broadcasters would use this spectrum for free over-the-air broadcast service; therefore, it cannot be auctioned under Section 309(j)." *Id.*

While the Commission is probably correct that most broadcasters would use the ATV spectrum for free over-the-air broadcast service, it is far less certain ***how much*** free over-the-air service broadcasters intend to provide. If the language in the pending House and Senate telecommunications bills authorizing the Commission to grant this spectrum to the broadcasters is any indication, some broadcasters would like to provide ***just one*** free over-the-air service. *See* n.3 and accompanying text, *above*. Thus, if the spectrum is used for just one free SDTV service and the rest for subscription services, the spectrum's "principal use" would be for subscription services and therefore could, and MAP, *et al.* assert should, be subject to auction under Section 309(j).

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to get a license through this method").

Therefore, unless the Commission requires that the spectrum intended for ATV be principally used for free over-the-air television services, it should auction the spectrum. As discussed in Section IV.B., *below*, the Commission should define "principally used" to mean that at least 75% of a broadcaster's capacity must be used for free over-the-air broadcasting.

IV. DEFINITION OF SERVICE

Assuming that it will grant incumbent broadcasters the full 6 MHz allocation, the Commission seeks comment on the type of services in which it should permit broadcasters to engage on the ATV spectrum. Although it expresses concern that "any flexibility... must not undermine our American system of universal, free over-the-air television," the Commission concludes that "[a]llowing at least some level of flexibility [of spectrum use] would increase the ability of broadcasters to compete in an increasingly competitive marketplace." *FNOPR* at ¶23. The Commission thus seeks comment on three issues: 1) whether the Commission should require broadcasters to provide a minimum amount of HDTV, 2) to what extent it should permit broadcasters to use ATV spectrum for uses other than free over-the-air broadcasting, and 3) what types of ancillary and supplementary services broadcasters should be permitted to provide.

As noted previously, MAP, *et al.* urge that, if the Commission chooses to grant ATV spectrum to incumbent broadcasters, they should be afforded only so much capacity as is necessary to provide one SDTV program "channel" or service. The remainder of these comments assume that the Commission will grant the full 6 MHz to incumbent broadcasters; in that event, MAP, *et al.* call upon the Commission to adopt particular policies to ensure that the public is adequately compensated

A. HDTV

There appears to be little reason for the Commission to mandate HDTV service. As is plainly evidenced by the broadcasting industry's massive legislative campaign to attain "spectrum flexibility," it is apparent that few broadcasters seek to provide HDTV soon, if ever, and most are not interested in providing it at all. Moreover, there is little evidence that the American public wants or needs it. *See, e.g.*, Edmund L. Andrews, "Quest for Sharper TV Likely to Bring More TV Instead," *NY Times*, July 9, 1995 at D8; Paul Farhi, "Coalition Plans to Build Model HDTV Station; Facility to Test, Refine New Technology," *Washington Post*, Nov. 9, 1995 at B11; Paul Farhi, "HDTV: High Definition, Low Priority?," *Washington Post*, March 23, 1995 at D1.[14] HDTV would provide an extraordinarily clear picture with compact disk quality sound - but it would take an extraordinarily large and expensive television set to receive the technology's full benefits.

MAP, *et al.* believe that the Commission should let the marketplace decide whether broadcasters should provide HDTV. There is no compelling, or even substantial, reason for government action here. HDTV does not increase the number of voices in the marketplace of ideas, nor does it contribute to the civic discourse that is essential in a democracy. There is no indication that HDTV is important to the vitality of free over-the-air television. If the public demands terrestrial HDTV, broadcasters will certainly provide it.

To the extent that the Commission is concerned that its actions may penalize those who

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[14]Indeed, in Japan, analog HDTV has been a terrific failure. Although HDTV has been available there since 1991, Japanese manufacturers have sold but 30,000 receivers at $6000 each. Farhi, "HDTV: High Definition, Low Priority ?" *See* Andrew Pollack, "Japan May Abandon its System for HDTV," *NY Times*, February 23, 1994 at D7.

have invested in HDTV research and development, it is well to point out that there are numerous defense, medical and other uses for HDTV, and that non-terrestrial transmission technologies and recorded media may prove to be more appropriate means of distributing high definition program matter. *See* William J. Broad, "US Counts on Computer Edge in the Race for Advanced TV," *NY Times*, November 28, 1989 at C1. ("The race for high-definition television is considered important by some experts because the technology may represent more than a path to sparkling images and sound as good as compact disks. Some experts see it creating a wide variety of new products, including video systems for education, industry, medical imaging and the military.") In any event, the Commission is tasked with ensuring that the public's interest is served. In the absence of evidence that the public will be harmed from the Commission not mandating a minimum level of HDTV, the Commission should not do so.[15]

B. Uses of Spectrum Other than Free Over-The-Air Broadcasting.

As discussed in Section III, *above*, for the Commission to justify not subjecting the ATV spectrum to auctions, and for policy reasons, the Commission should mandate that the ATV spectrum be "principally used" for free over-the-air broadcasting. "Principal use" should be defined as no less than 75% of a broadcaster's capacity. Assuming that the "Grand Alliance" system of digital transmission uses 19 megabits per second in a 6 MHz allocation, a broadcaster would have to ensure that at least 14.25 megabits per second are used for free over-the-air service.

The policy justification for this standard is simple - broadcasters will be receiving free and exclusive use of publicly-owned spectrum that has been reserved for free over-the-air broad-

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[15]The burden of showing public harm should be upon those who advocate that the Commission mandate HDTV